Supreme Court of the United States

OCTOBER TERM, 1946

No. 617

ESTATE OF WALTER C. BURR, Deceased, JEROME P. BURR and CLINTON S. BURR, Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court (R. 80) rendered in the above case on July 17, 1946, confirming a decision of the Tax Court entered December 5, 1944 finding a deficiency in the estate tax paid by the petitioners on behalf of their decedent.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347(a)).

The Opinions of the Court Below

The opinion of the Tax Court (R. 33, 34) is officially reported in Docket No. 2500. The Opinion of the Circuit Court of Appeals for the Second Circuit annexed to the Transcript of Record (R. 80).

Statute and Regulations Involved

Section 811—Internal Revenue Code

"SEC. 811. GROSS ESTATE.

* * * * *

"(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without

such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * *

Summary Statement of Matter Involved

The decedent, Walter C. Burr, died on April 3rd, 1940, and his Last Will and Testament was admitted to probate on the 9th day of May, 1940, by the Surrogate's Court of Kings County, State of New York (Stip. par. 1; R. 16).

The decedent left him surviving three sons, Clinton S. Burr, Jerome P. Burr and W. Winthrop Burr. The decedent on December 7, 1934, executed three single life insurance contracts with The Prudential Insurance Company of America. The face amount and the premiums of the several policies are as follows:

Face Amount	*Single Premium*
$33,334	$29,959.93
33,333	29,959.03
33,333	29,959.03

(Stip. par. 3; R. 17).

The insurance contracts were issued by The Prudential Insurance Company of America on the condition that such insurance contracts would not be issued unless annuity contract #A8283 was issued. The decedent at the time the insurance contracts were issued was seventy-five years, two months and twenty-nine days of age, and a medical examination was not required as a condition precedent to the issuance of the life insurance policies (Stip. par. 4; R. 17).

The decedent thereafter on December 20, 1934, executed and delivered an assignment of each of the three insurance policies to his three sons, and thereafter, in July, 1936, executed and delivered assignments of all other rights accruing under the insurance contracts to his three sons. The assignments were absolute and irrevocable, and after the assignments of 1936 decedent retained no rights in the insurance contracts (R. 33).

The decedent at the time of the issuance of the insurance contracts and assignments was in reasonably good health for a man of his age, attending to business matters and enjoying motoring trips and walks. Decedent had no serious ailments but was afflicted with mild diabetes and was taking insulin, which treatments were discontinued in the Summer of 1934. Decedent, as part of his plan to take care of himself, had frequent medical examinations. His death was caused by acute uremia due to a prostatic condition. Decedent had anticipated living for many years more. (Memorandum Findings of Fact and Opinion; R. 33.)

Question Presented

Did the Circuit Court of Appeals err in holding that the insurance proceeds in the sum of $100,165.99, of the insurance contracts (Stip. par. 3; R. 17) are to be included in decedent's gross estate, pursuant to Section 811(c) of the Internal Revenue Code.

The Decisions Below

The Tax Court held that in accordance with the ruling in *Estate of Cora C. Reynolds*, 45 B. T. A. 44, the assignments of the insurance contracts were transfers by the de-

cedent "intended to take effect in possession or enjoyment at or after his death", or "under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the * * * enjoyment of, or the right to the income from, the property" (R. 101). The Tax Court stated that it was unnecessary to make a finding as to whether or not the transfers were made in contemplation of death (R. 101).

The Tax Court found that the assignments by the decedent to his sons were "absolute and irrevocable, and after the assignments of 1936, decedent retained no rights under the insurance contracts. (R. 97, also referred to in the decision of the Circuit Court of Appeals.)

The Circuit Court of Appeals affirmed the decision of the Tax Court and stated that this case is similar to *Helvering* v. *Le Gierse*, 312 U. S. 531, except for the assignments, which the Circuit Court of Appeals stated did not make sufficient difference to take this case out of the scope of the *Le Gierse* case, *supra*. The Circuit Court of Appeals further precisely stated, "The precise question seems not to have been passed on by any court (R. p. 80, 4th par.).

Reasons for Granting of This Writ

The Writ of Certiorari should be granted because the Court below was in error, and for the reason that as stated by the Circuit Court of Appeals, the precise question has not been passed on by any court. Furthermore it is respectfully submitted that there should be a decision by the highest court on this substantial question of Federal law which affects a substantial number of taxpayers and is of great importance in the administration of the revenue law.

The Tax Court held in the *Cora C. Reynolds* case, *supra*, cited by the Tax Court in the decision herein, and the Circuit Court was in agreement with the contention that the contract for an annuity and a contract on the life of the purchaser of the annuity are "inseparable" and "indivisible". This conclusion is contrary to the decision in the case of *Legg* v. *St. John*, 296 U. S. 489 (1936). The decision in the *Cora C. Reynolds* case, *supra*, and in the instant case is also contrary to the decisions in *Commissioner* v. *Peter H. Meyer, Jr., et al.*, 139 Fed. (2d) 256 (C. C. A. 6th) (1943); *Helvering* v. *Edna E. Meredith*, 140 Fed. (2d) 973 (C. C. A. 8th (1944); *Estate of Charles R. Dundore, et al.*, entered as a memorandum opinion January 16, 1942, Docket No. 103899; *Mary S. Tonkin, et al., Ex'rs* v. *U. S.*, 56 Fed. Supp. 817 (1944). These decisions will be discussed in the petitioners' supporting brief.

There is apparently a conflict of decisions on a substantial question which has not been passed on by any court as stated by the Circuit Court of Appeals in its decision.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari issue under the Seal of this Court to review the decision of the Circuit Court of Appeals for the Second Circuit in the instant case.

Dated, New York City, October 8, 1946.

ESTATE OF WALTER C. BURR, Deceased,
JEROME P. BURR and CLINTON S. BURR, Executors,
Petitioners.

By: HARRY E. RATNER,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Question Presented, Statement of Case, Statutes, etc.

The statement of the question presented, the statement of the case, and the statutes involved are in the petition.

Specifications of Error and Summary of Argument

1. An important and substantial question of Federal Law is involved which has not been, and should be, settled by the Supreme Court.
2. The Circuit Court of Appeals erred in including the proceeds of the insurance contracts in the decedent's gross taxable estate.

POINT I

An important and substantial question of Federal Law is involved which has not been, and should be, settled by the Supreme Court.

The Circuit Court of Appeals precisely stated in its decision, "The precise question seems not to have been passed on by any court." The question involved is most important and substantial and requires and merits the consideration and decision of the highest court. The question presented affects a great number of purchasers of similar contracts of insurance with like fact situations.

POINT II

The Circuit Court of Appeals erred in including the proceeds of the insurance contracts in the decedent's gross taxable estate.

The learned Lower Tax Court in the opinion below stated that the sole issue is the includability of the estate of the decedent under Section 811(c) of the Internal Revenue Code of the proceeds of three single premium "life insurance" policies taken out by the decedent on his own life in conjunction with an annuity contract and which insurance policies were transferred to decedent's three sons by irrevocable assignments executed in 1934 and 1936. The Lower Tax Court stated that in every material aspect, the case herein is substantially on all fours with the Estate of Cora Reynolds, reported in 45 B. T. A. 44 and that on the authority of that case, the transfer or series of trans-

fers by decedent "intended to take effect in possession or enjoyment at or after his death" or "under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the * * * enjoyment of or the right to income from the property." The Tax Court in the Memorandum Findings of Fact found that the transfers were not in contemplation of death and stated in the opinion that the disposition makes unnecessary a finding as to whether the transfers were made in contemplation of death.

The sole question, therefore, is whether the Tax Court and the Circuit Court of Appeals erred in holding that the transfers of the insurance contracts by decedent were "intended to take effect in possession or enjoyment at or after his death" or "under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the * * * enjoyment of or the right to the income from the property." It is respectfully submitted that the instant case is not on all fours with the Estate of Cora Reynolds *supra*. In the *Reynolds* case decedent had created a trust and two insurance policies were transferred to the Trustees to whom the proceeds after the death of decedent were to be paid and the income to be paid to designated beneficiaries after her death. The enjoyment of the proceeds of the insurance by the beneficiaries was deferred through the medium of Trustees. The Trustees were charged with the collection of the insurance proceeds at the death of the insured. The policies issued to the insured herein were two separate policies. While single premium combination of an annuity and life insurance the

policies or contracts were actually separable in fact as well as in form. The income aspect arising from the annuity certainly under the facts was separable from the corpus contained in the life insurance, and the gift of the insurance did not affect the income yield to the annuitant. The absolute, irrevocable and unconditional assignment of the insurance policies by the decedent to his sons resulted in granting to them property rights absolutely independent of the decedent's rights in the annuity contract. The fact that the assignees deferred the exercise of the right to convert the insurance contracts to cash was not bound in any way to the annuity contract, but an exercise of business prudence on behalf of the assignees. In the instant case, the form of the assignments were absolute and irrevocable and after the assignments of 1936, the decedent retained no rights whatsoever under the insurance contract (Memorandum Findings of Fact and Opinion; R. 33). In the instant case, since the assignments were absolute and irrevocable enabling the sons to whom they were assigned to surrender and convert the policies to cash, it is clear that decedent had no rights whatsoever in the insurance policies. Certainly the finding that the transfers were absolute is inconsistent with the ruling that the transfers were "enacted to take effect in possession or enjoyment at or after his death". It would appear that the Lower Tax Court during the course of the hearing made most pertinent observations and displayed a keen appreciation of the factual situation and the legal connotations which were not followed in the decision below in the Lower Tax Court or the Circuit Court of Appeals. In order to present clearly the issues, we will quote a substantial portion of the record which contains the discussion

between the Lower Tax Court and counsel for the respondent. It is respectfully submitted that this discussion clearly shows the weakness of respondent's case and dictates a conclusion other than that reached in the decisions below (R. 39-41):

> "Mr. Dahlquist: If the Court pleases, I already stated there were two questions which are presented in this case.
>
> First, is whether the transfer and assignment of the insurance policies involved herein, were made in contemplation of death; and
>
> Secondly, if they were not so made, we believe they were intended to take effect and possession or enjoyment at or after death.
>
> It is the respondent's contention, that the petition—the issue in this case, is fully controlled by the Legeirse decision involving the question of the issuance of insurance policies in conjunction with annuity policies.
>
> In other words, we—
>
> The Court: What did that case hold?
>
> Mr. Dahlquist: It held that where insurance policies were issued, or rather, an insurance policy was issued in conjunction with an annuity policy, and the period, that the insurance would not have been issued unless the annuity policy had simultaneously been issued.
>
> Then, it did not constitute an insurance contract. There was no insurance risk involved in the ordinary sense. It was merely an investment proposition.
>
> The specific question involved in that case was whether the decedent estate was entitled to $40,000 compensation for insurance. It was decided by Justice Murphy, speaking for the Court, that it did not constitute an insurance contract.
>
> We have the same situation here in, as Counsel has stated and as is set forth in the stipulation of facts, that the three so-called life insurance policies which were issued in this case would not have been issued unless there was also an annuity policy issued and the annuity policy could have been

issued, of course, without the issuance of the life insurance policies.

The Court: I do not understand what that has to do with it. The question we have is whether the property given away was completely given at the time or effective date of it, which is to be at death.

What difference does it make how you pay for it or the circumstances under which you got it?

The question is, how you gave it away, isn't it?

Mr. Dahlquist: Yes, of course, that is our primary contention, that it is a matter here—that the transfer, I mean, the transfer of insurance herein, was either made in contemplation of death or intended to take effect in enjoyment or possession at or after death. That is pursuant to the statute.

The Court: What I am trying to get at is this: As far as the application of Section 811(c) is concerned, you would take the same position if it was an ordinary insurance policy taken out when a man was 21 and assigned at the age when he assigned it?

Mr. Dahlquist: Yes.

The Court: In other words, you say that every insurance policy that is assigned, constitutes a transfer of property to take effect at or after death?

Mr. Dahlquist: I do not think it is necessarily that. It may be that I think the question of circumstances would be very important.

For instance, if a man took out a single premium life insurance policy at the age of thirty and being in good health at the age of 35 he made a complete assignment of that to his wife or to anyone else, I think that we would not attempt to raise the question as to whether that was intended to take effect and enjoyment or possession at or after death.

The Court: Why not?

Mr. Dahlquist: It is a matter of two things, I think. The age at which he does it is one thing and the complete necessity of the assignment is another. I think that the age of the decedent at the time this assignment was made in this case, is extremely important.

The Court: Bearing on contemplation of death? But it would not have any effect upon when the transfer was effected, would it not?

Mr. Dahlquist: No, not on that question.

The Court: That is the phase that I am talking about. I want to get what your point is.

It is whether all insurance policies are ones where the effective date is at death of the assured?

Mr. Dahlquist: Yes, where it does involve insurance policies that would follow, because as insurance policy by itself, its very nature, matures at date of death of the donor, as it would be whether it was a gift or not, as was made or attempted to be made in this case.

The Court: In this policy, could the donees have cashed it in?

Mr. Dahlquist: There is perhaps some dispute on that point, your Honor. The assignment in its form, was complete. Just what would have followed pursuant to that assignment, is a question of interpretation of the assignment."

As stated above, the Tax Court subsequently held that the assignments were absolute and irrevocable (Memorandum Findings of Fact and Opinion; R. 33). In the above questioning and discussion the Tax Court brought out the simple facts that all ordinary life insurance policies contemplate and mature at death. It is, therefore, clear that the test whether a transfer is "intended to take in possession or enjoyment at or after death" could not be applied here as the right of enjoyment vested simultaneously with the transfer by assignments of the insurance contracts to decedent's sons.

Let us next consider the alternative provision whether under the assignment the decedent "retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the * * * enjoyment of or the right of income from the property". As previously stated, the decedent absolutely and irrevocably assigned all his rights

under the insurance contracts in 1936 (page 33, Memorandum Findings of Fact and Opinion) and retained no rights. The assignee's sons of the decedent could have converted to cash the insurance policies at any time so that it would be within a period ascertainable without reference to the decedent's death.

The decision in the case of *Helvering* v. *LeGierse*, 312 U. S. 531, upon which great emphasis has been placed, does not apply to the instant case. That case ruled that where an annuity policy and life insurance policy were purchased together, with a single premium policy at an advanced age without a medical examination, the insurance contract would not be considered as insurance for the purpose of allowing under Section 302 of the Internal Revenue Code an exemption of the proceeds of life insurance up to the exempt amount of $40,000. That is not the issue here and as the Lower Tax Court stated, it makes no difference what you call it, but how you gave it away (R. 40).

In the *Cora C. Reynolds* case, *supra*, the Tax Court based the decision on the conclusion that the life insurance contracts and the annuity contract constituted one indivisible transaction. This ruling is at variance with other decisions.

In *Helvering* v. *Edna E. Meredith*, 140 Fed. (2d) 973 (C. C. A. 8th) 1944, the taxpayer purchased a life annuity and two single premium life contract policies on the same day. The Tax Commissioner considered the policies as one investment and taxed the income therefrom. The Circuit Court of Appeals held that the contracts were not a single investment, but severable contracts. To the same effect

is *Commissioner* v. *Peter H. Meyer, Jr., et al.*, 139 F. (2d) 256 (C. C. A. 6th) (1943).

The case of *Legg* v. *St. John*, 296 U. S. 489 (1936) involved a somewhat analagous situation where Legg purchased a life policy and a disability policy at the same time. The question arose whether Legg, a bankrupt, or his trustee in bankruptcy was entitled to the disability payments. Mr. Justice Brandeis stated that the life policy and the disability contract were separate instruments. In that case Legg could only purchase the disability policy if he purchased the life insurance contract. The Court held that the two policies were separate, the life insurance belonged to the bankrupt and the trustee received the monthly disability payments.

In *May S. Tonkins, et al., Executors* v. *U. S.*, 56 Fed. Sup. 817 (1944), the decedent transferred securities to a trustee and at the same time brought annuity contracts. The trustee bought single premium insurance contracts on the decedent's life, the issuance of the life insurance being predicated on the purchase of an annuity. The Court ruled that even though the insurance company would not have issued the single premium policy without the annuity contract, the face amount of the life insurance should not be included in the gross estate.

It is respectfully submitted that as a practical matter, once the life insurance contract is purchased, and the annuity contract is purchased, they become two separate and distinct contracts, unrelated to each other. As was done in the instant case, the life insurance contracts may be transferred or assigned. What difference does it make if the assignee chooses to cash in the policy or not. The Circuit Court of Appeals in its decision infers that if the sons of

the decedent had actually cashed the insurance policies, the decision of the Circuit Court of Appeals would have been different (R. 6th paragraph of decision of the Circuit Court of Appeals). In furtherance of this observation the Circuit Court of Appeals states that if the sons had actually cashed the insurance policies, the contracts would have been separated, and the insurance company would then have had to make annuity payments out of income and capital from the annuity premium. What difference does it make out of what fund the insurance company would pay, or what method of bookkeeping the insurance company employs. The insurance company had executed certain contracts and had definite obligations based on certain contingencies, and the source and means of payment should have no bearing on the question of payment of estate taxes.

The instant decision of the Circuit Court of Appeals is a declaration to all assignees of life insurance, purchased by single premium at the same time as an annuity policy that unless the assignees cash in the policy prior to the death of the assignor policyholder, the proceeds of the life insurance will be taxed as part of the decedent's gross estate.

Certainly this whole question should not depend on whether the policies were cashed in. It is respectfully submitted that reliance on that reasoning demonstrates the lack of soundness in the decision.

It is respectfully submitted that the decision below should be reviewed by this Court and a Writ of Certiorari should issue because the question involved is substantial, has never been passed on, and is important to the administration of the Internal Revenue Laws and should be settled by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

HARRY E. RATNER,
Counsel for Petitioners.